

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

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Notice of Proposed Rulemaking)	
)	CS Docket No. 02-52
Appropriate Regulatory Treatment for)	
Broadband Access to the Internet Over)	
Cable Facilities)	
)	

REPLY COMMENTS OF THE CITY OF ORANGE, CALIFORNIA

These comments are filed by the City of Orange, California, a local franchising authority, in support of the comments filed by the Alliance of Local Organizations Against Preemption (“Alliance”). The City of Orange submits its comments chiefly to support its ability to obtain fair and reasonable compensation for use of taxpayer purchased and constructed public rights of way by Internet providers, specifically, in this case, cable companies which are providing Internet service over their cable systems.

1. The City of Orange and the status of cable modem services.

The City of Orange has a population of approximately 130,000. Time Warner/AOL provides cable television service to approximately 95% of the population, while Cox Communications provides cable television service to approximately 5% of the population. The City is undergoing expansion to the east, where it is anticipated that Cox will pick up an additional 12,000 customers. Both Time Warner and Cox offer cable modem service. Time Warner completed a significant fiber backbone upgrade of its system approximately three years ago.

2. Our franchise and cable modem service.

The franchise agreement with Time Warner was entered into in 1996. At the same time, the City’s franchise ordinance was revised. Both the agreement and the ordinance were drafted anticipating that Time Warner would be providing cable modem

service to the customers of Orange. The Cox franchise agreement was entered into in 1988 and runs to October 23, 2004. When Cox recently changed ownership, it agreed to become subject to the City's revised cable television ordinance. In entering into the 1996 franchise agreement, Time Warner and the City agreed that "as compensation for the use of valuable right-of-ways, and to defray a portion of the costs associated with cable regulation during the franchise term," Time Warner would "pay the City five percent (5%) of the gross annual receipts it derives..." Further, the parties agreed that gross annual receipts means "all revenue...received...by Grantee from or in connection with the distribution of *any service* on the cable system or the provision of any service related activity in connection with the cable system, whether or not authorized by this franchise." *Cable Television Franchise Agreement between Time Warner and City*, pages 4, 13.

Until 2001, there has never been any dispute between the City and Time Warner and the City and Cox over whether franchise fees for cable modem services were required under the respective franchises. Nor did the City ever dispute that Time Warner and Cox were permitted to provide cable modem service under the franchise agreements and the City's ordinance. The City receives approximately \$100,000 annually in franchise fees from cable modem service revenue. The City estimates that it will lose \$100,000 annually, growing as the City expands.

The City is not aware of any evidence that any of the City's franchise requirements have imposed any undue economic burden or otherwise hindered the ability of Time Warner or Cox to provide cable modem services and compete with other such providers. In fact, the City believes that cable operators have an advantage. Most of the physical plant for cable modem services was put into place under the authority granted to cable operators under their franchise agreements and prior to the advent of Internet services. The cost of that physical plant is passed on not only to Internet service customers, but also cable television customers. Non-cable television operators attempting to get into the broadband market do not enjoy this advantage.

The ability to charge a franchise fee should be maintained for the following reasons:

- a. One of the stated purposes of the Communications Act is to "promote competition in cable communications and minimize unnecessary regulation

that would impose an undue economic burden on cable systems.” 47 U.S.C. Section 521(6). In setting the ceiling on franchise fees at 5%, Congress apparently believed that a 5% fee would not impose an undue economic burden and in fact, the cable television industry has thrived under the fee. There is no evidence that the City is aware of that the payment of the franchise fee has hindered the cable television industry.

- b. The fee is also consistent with 47 U.S.C. Section 253(c) which allows the City to charge a reasonable fee to telecommunications providers for the use of its streets. As Congress has previously found 5% reasonable for cable television, it would follow that 5% would be reasonable for cable modem service.
- c. Private enterprise should pay a fair share for the use of public property to further their enterprises and should not get a government subsidy, which gives it an advantage over other competitors such as satellite, which must pay to use public and private property to site their facilities. Although there is no dispute about the advantages of cable modem service, not all taxpayers utilize the service. Indeed, it is likely that the poor utilize cable television and cable modem services the least. Yet, their tax dollars, as well as the tax dollars of everyone else, do pay for the public right of ways. Thus, tax dollars are being used to subsidize private non-essential services, such as the Internet and e-mail, which the poor often cannot afford. The voters in the State of California have passed several initiatives over the last decade or so to limit taxes and to require that government pass on the costs of government provided services to those who use the services. The franchise fee is in line with this movement toward user pays.
- d. Other utilities pay franchise fees. The City has heard no credible argument why cable modem services should be exempt, especially when franchise fees are paid by utilities that provide more essential services such as gas and electricity.
- e. Cable modem service is jointly marketed with cable television service, the services appear on the same bill, are provided over the same cable system and the City receives complaints about both.

- f. The City has had to intervene in numerous cable operator complaints, including disputes arising out of cable operator trenching and striking of other utilities, the location of communications pedestals, whether or not service had to be provided to specified residential areas and construction impacts. In the past, the City has had to address complaints about picture quality and sexually explicit adult programming bleeding through to customers who had not requested the programming. Street cuts reduce the useful life of streets and the more utilities that are in the streets, the more costly, complicated and time-consuming public right-of-way projects become.
- g. The City is unaware of any evidence that the lack of a franchise fee will lead to lower cable modem prices to customers. Cable operators are in the business to make money and they will charge whatever the market will bear. As a prime example, once the regulation of rates for cable programming services was eliminated, cable operators dramatically increased their rates, even though franchise fees on cable television service did not change. There is no market incentive for cable operators to pass on any franchise fee savings to cable modem customers and no evidence to indicate they will.
- h. Although requests have slowed recently, perhaps due to the economy, during the past several years the City has been inundated with requests by telecommunications companies to put fiber into City streets. The operations are disruptive to businesses and residences, as noted street cuts reduce the useful life of the streets, other utilities are often hit (in one case a telecom hit a City sewer causing the street to ultimately collapse) and the City spends time inspecting the construction work. Often these telecoms are either not providing any services to the City or are cherry picking the most profitable customers.

4. Conclusion

The City believes that requiring the franchise fee is sound public policy and furthers the goals of the Communications Act and the voters of this state. The City

believes that elimination of the franchise fee is essentially a gift of public property with no promise or hope for a public benefit. The City believes that is important to at least encourage broadband deployment and that it should be made available to the entire community, recognizing that not all can afford it. The City does its part in attempting to make broadband services available to all, by providing no cost Internet stations in all of its public libraries. The fees from Internet revenue help pay the cost of these programs and other activities and are reasonable and fair given the private benefit that cable operators obtain from utilization of the public right of ways. Despite some bumps in the road, the City has enjoyed a productive and professional relationship with its cable operators and never heard any complaints that the imposition of the franchise fee was hindering their ability to provide cable modem services.

Respectfully Submitted,

David De Berry, City Attorney